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No. 91-1140

In the Supreme Court of the United States

OCTOBER TERM, 1991

WAGNER SEED COMPANY, INC., PETITIONER

v.

GEORGE H.W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ALBERT M. FERLO, JR.
J. CAROL WILLIAMS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly accorded *Chevron* deference to the Environmental Protection Agency's interpretation of the reimbursement provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9606(b)(2).

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A63, is reported at 946 F.2d 918. The district court's opinion, Pet. App. A64-A83, is reported at 709 F. Supp. 249.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1991. The petition for a writ of certiorari was filed on January 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner's animal feed and agricultural supply warehouse burned down, spreading hazardous substances from pesticides and other agricultural chemicals into the surrounding residential community. See C.A. App. A89-A93.[1] This case concerns who should pay the cost of removing those substances.

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601-9675, because of widespread concern over the severe environmental and public health effects of improper hazardous waste and contaminant disposal. See generally *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990). Under CERCLA, EPA has two principal methods for addressing contaminated sites.[2] Under Section 104, EPA may undertake response actions itself. 42 U.S.C. 9604. In such cases, EPA can recover its response costs from responsible parties pursuant to Section 107(a). 42 U.S.C. 9607(a).[3] Recovered costs are used to replenish the Hazardous Substance Response Trust Fund (Superfund), 26 U.S.C. 9507(b), which Congress established to pay for federal response actions. 26 U.S.C. 9507(a).

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[1] "C.A. App." refers to the Appendix filed in the court of appeals.

[2] Pursuant to 42 U.S.C. 9615, the President has delegated clean-up response authority under CERCLA (with certain exceptions not relevant here) to EPA. Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. 9615.

[3] Responsible parties include certain present and past site owners and operators and specified categories of generators and transporters of hazardous substances. 42 U.S.C. 9607(a).

In the alternative, EPA may proceed under Section 106(a) by requiring persons (including responsible parties) to undertake response actions themselves. 42 U.S.C. 9606(a). As of 1985, entities undertaking such actions could not recover their costs from the government; CERCLA did not provide for reimbursement. But the Superfund Amendments and Reauthorization Act of 1986 (SARA) changed that. It added Section 106(b)(2), which states, in relevant part:

> Any person who receives and complies with the terms of any order issued under [42 U.S.C. 9606(a)] may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

SARA § 106(b)(2)(A), 42 U.S.C. 9606(b)(2)(A). To recover, the applicant must establish (by a preponderance of the evidence) that it is not liable for response costs and that the costs it seeks to recover are reasonable. SARA § 106(b)(2)(C), 42 U.S.C. 9606(b)(2)(C).[4] Disappointed reimbursement applicants may seek judicial review by filing an action against the President. SARA § 106(b)(2)(B), 42 U.S.C. 9606 (b)(2)(B).

2. Petitioner is an agricultural supply business which stored various agricultural products, including pesticides and other agricultural chemicals, at its warehouse in a residential neighborhood in Farmingdale, New York. On June 1, 1985, a fire at the warehouse released various contaminants into the environ-

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[4] The party may also be entitled to reimbursement if it shows, on the administrative record, that the clean-up actions ordered were arbitrary, capricious, or otherwise illegal. 42 U.S.C. 9606(b)(2)(D).

ment. C.A. App. A31. EPA's Regional Administrator determined that the release may have imminently and substantially endangered public health, welfare and the environment. C.A. App. A92-A93. Accordingly, he issued a Section 106(a) order on December 31, 1985, directing petitioner to conduct various clean-up activities. C.A. App. A88-A106.[5]

Petitioner filed suit to enjoin EPA from ordering the clean-up, arguing that orders made pursuant to 42 U.S.C. 9606(a) were unconstitutional. Wagner C.A. Br. 4. The district court denied petitioner's motion for a preliminary injunction and the decision was affirmed on appeal. *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310 (2d Cir. 1986).

3. After petitioner had incurred approximately 98% of its ultimate clean-up costs, Congress enacted SARA. Pet. App. A5. Petitioner applied for reimbursement under SARA Section 106(b)(2)(A). Petitioner claimed that the disaster was caused by lightning and that it was therefore not liable and was entitled to reimbursement of its costs under CERCLA.[6] EPA denied the petition, explaining that Section 106

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[5] Specifically, petitioner was required to: (1) immediately remove contaminated soil from the site and an adjoining site owned by the Long Island Railroad, C.A. App. A93-A94; (2) develop a work plan, implementation schedule, and "Site Operations Plan" for the investigation and remediation of contamination at the site, *id.* at A94-A97; and (3) implement those plans, as modified and approved by EPA, *id.* at A98.

[6] CERCLA provides three limited defenses to liability: acts of God, acts of war, and acts or omissions of a contractually unrelated third party, if the defendant exercised due care and took appropriate precautions. 42 U.S.C. 9607(b). CERCLA limits the act of God defense to instances in which the effects of a natural disaster or phenomenon "could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. 9601(1).

(b)(2)(A) applies only to entities that both "receive[d] and complie[d] with" an administrative order after SARA's effective date. C.A. App. A72-A76. Because petitioner received its order before SARA's effective date, it did not qualify under SARA's reimbursement provision. C.A. App. A74.[7]

4. Petitioner then filed a complaint in district court, arguing that EPA's decision to deny reimbursement of its clean-up costs under Section 106(b)(2)(A) should be overturned. C.A. App. A35-A36. The government moved to dismiss, C.A. App. A39, and the district court granted the motion. It held that the statute was ambiguous as to whether Section 106(b)(2)(A) applies to entities, such as petitioner, who received their orders and began their clean-up work before SARA's enactment but completed it after enactment. The court therefore turned to the tenets of statutory construction. Pet. App. A70-A77. Those, it concluded, favored EPA's interpretation. Pet. App. A71, A82-A83.

The district court also held that EPA's construction of Section 106(b)(2)(A) is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), and therefore must be respected if reasonable. The court held that it was. EPA's interpretation, the court explained:

> simply placed those who were in the process of cleaning up in the same boat as those who completed cleanup before § 106(b)(2) was enacted.

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[7] EPA had taken this same position earlier with respect to the reimbursement petition involved in *Bethlehem Steel Corp.* v. *Bush*, 918 F.2d 1323 (7th Cir. 1990), and has consistently adhered to it. See Pet. App. A17; *e.g.*, *Gary Steel Supply Co.* v. *Reagan*, 711 F. Supp. 471, 473-474 (N.D. Ill. 1989).

> The EPA's decision to make the cut-off where it did—not allowing reimbursement to companies who were already cleaning up when § 106(b)(2) was enacted—was a reasonable interpretation of the statute.

Pet. App. A82. Accordingly, it held that Section 106(b)(2)(A) did not authorize recovery. Pet. App. A82-A83.

5. The court of appeals affirmed. It considered petitioner's numerous arguments as to why *Chevron* deference was inappropriate and rejected each. Pet. App. A10-A28. It held that EPA is charged in the first instance with interpreting the language of Section 106(b)(2)(A), Pet. App. A26-A27, and that the language of the statute is ambiguous as to whether Congress intended it to apply to one who receives an order prior to SARA's enactment but completes clean-up after enactment, Pet. App. A29-A36. Accordingly, it deferred to EPA's permissible interpretation of the statute. Pet. App. A36. Judge Williams dissented, Pet. App. A37-A63, on the ground that EPA was not accorded administrative authority over Section 106(b)(2)(A), but rather authority to pay claims to avert lawsuits; consequently, Judge Williams concluded that EPA's interpretation of Section 106(b)(2)(A) was not entitled to deference.

ARGUMENT

The petition presents one, narrow question: whether EPA's interpretation of SARA Section 106 (b)(2)(A), 42 U.S.C. 9606(b)(2)(A), is entitled to deference under this Court's holding in *Chevron*, 467 U.S. at 842-845. That question, which is answered by reference to settled principles of administrative law, has been answered twice in the courts of appeals, both times in the affirmative. Because the decision below does not conflict with the decision of any other court of appeals and is consistent with the decisions of this Court, see, *e.g.*, *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992), slip op. 15, 18-19, further review is not warranted.

1. Petitioner concedes, Pet. 15 n.4, that the court of appeals' holding is consistent with the only other court of appeals decision addressing this issue. In *Bethlehem Steel Corp.* v. *Bush*, 918 F.2d 1323 (1990), the Seventh Circuit considered whether SARA's reimbursement provision, 42 U.S.C. 9606(b)(2)(A), applied to entities that were already in the process of cleaning up at the time SARA became effective. Finding the statutory language ambiguous, the Seventh Circuit turned to the issue of whether it was appropriate to defer to EPA's reasonable interpretation. Like the court of appeals below, the Seventh Circuit held that it was. 918 F.2d at 1327-1328. See also *Gary Steel Supply* v. *Reagan*, 711 F. Supp. 471, 474 (N.D. Ill. 1989) (deferring to EPA's construction of Section 106(b)(2)(A)). The court reasoned that, because EPA both played a major role in the legislative process and was the entity "charged with the responsibility of setting [the statute's] machinery in motion," deference to its contemporaneous construction was appropriate. *Bethlehem Steel Corp.*,

918 F.2d at 1328, quoting *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961). Petitioner wholly fails to address this reasoning.[8]

2. Petitioner nonetheless contends that deference is inconsistent with the statute. Specifically, petitioner argues that *Chevron* deference is improper where a statute provides for "a plenary right of action" in federal court. Pet. 16; accord Pet. 19 (court of appeals "misapprehended a critical statutory provision that obligated the *court* to examine the matter *de novo*"); see Pet. 19-22. Contrary to petitioner's assertions, however, nothing in 42 U.S.C. 9606 (b)(2)(B) prohibits courts of appeals from deferring to EPA's reasonable interpretation of ambiguous statutory language. Indeed, Subsection (b)(2)(B) does not even address the level of deference to be accorded EPA's construction; it only authorizes disappointed reimbursement petitioners to file suit.

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[8] Petitioner's claim that the circuits are in conflict over the different question of how much deference should be given to EPA's CERCLA liability interpretations, Pet. 37-38, is neither relevant nor supported by the cases petitioner cites. The issue of deference was not addressed in *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991); *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991); *United States* v. *Monsanto*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); or *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). In *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429, 436 (1st Cir. 1990), the court merely held that it was not required to accept EPA's view of the remedy selected; the court did not address *Chevron* deference. In *Environmental Defense Fund, Inc.* v. *City of Chicago*, 948 F.2d 345, 348 (7th Cir. 1991), the court found that "EPA's interpretation and the legislative history of the statute do little to resolve th[e] stand-off."

Nor does SARA Section 106(b)(2)(C), 42 U.S.C. 9606(b)(2)(C), upon which petitioner also appears to rely, see Pet. 11 n.3, prohibit deference to EPA's reasonable interpretation. Section 106(b)(2)(C) merely states that the party seeking reimbursement bears the burden of proving (1) that it is not liable and (2) that its costs were reasonable:

> [T]o obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under [S]ection 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

SARA § 106(b)(2)(C), 42 U.S.C. 9606(b)(2)(C). Here, as the court of appeals held, Pet. App. A10-A13, the issue was not whether petitioner was liable or whether petitioner's costs were reasonable. Rather, the question was whether eligibility for reimbursement depended on petitioner's having both "receive[d] and complie[d] with the" Section 106(a) order after SARA's effective date. Section 106(b)(2)(C) has nothing to say about that; and it certainly does not provide for a "plenary right of action" on that question.

Unable to locate any statutory language that prohibits courts from deferring to EPA's interpretation of the statute, petitioner asserts that the decision below is inconsistent with this Court's decisions in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990), and *EEOC* v. *Arabian American Oil Co.* (*ARAMCO*), 111 S. Ct. 1227 (1991). Pet. 22-25, 30-34. Petitioner misreads both those decisions.

a. In *Adams Fruit Co.*, this Court applied the basic principle that, in the absence of "a congressional delegation of administrative authority," *Chev-*

ron deference is inappropriate. 494 U.S. at 649. The statute there created a private right of action in federal court for certain injured workers. Under the Department of Labor's interpretation of one portion of that statute, a State could preempt the federal private right of action by making workers' compensation an exclusive remedy. But the statute gave the Department of Labor no role in administering the private right of action provisions. Congress had conferred on the courts the function of administering the private right of action and determining its scope. Accordingly, the Department of Labor's interpretation of those provisions was not entitled to deference. *Id.* at 649-650; see *id.* at 642-643.

Here, in contrast, EPA does have a role in administering the relevant provision: Parties seeking reimbursement must file a petition with EPA under Section 106(b)(2)(A) before seeking redress in the courts; no redress may be had unless and until EPA denies the petition. 42 U.S.C. 9606(b)(2)(B) (action may be filed only if the President refuses to grant all or part of petition). As the court of appeals held, the "interpretation of the 'receives and complies' requirement of § 106(b)(2)(A) is the agency's responsibility in the first instance." Pet. App. A26.[9]

Thus, unlike the Department of Labor's interpretation in *Adams Fruit Co.*, EPA's construction is not

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[9] Judge Williams's argument in dissent that this function is not administration of the reimbursement provision but rather a statutory opportunity "to pay the [applicant] off and thus avert suit," Pet. App. A39, is unsupported by the statute. Under Section 106(b)(2)(C), applicants must make certain showings to be reimbursed; nothing in Section 106(b)(2)(A) authorizes EPA to "pay off" applicants to avoid a lawsuit if those showings have not been made. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471-2475 (1990).

an attempt to define "the scope of the judicial power vested by the statute," Pet. App. A25-A26, quoting 494 U.S. at 650. Nowhere did EPA purport to determine the extent of judicial review, "the manner in which a person seeking reimbursement must 'file an action' [in federal court], or which is 'the appropriate United States district court' " in which to file. Pet. App. A27. Instead, EPA only construed that portion of the statute assigned to it for administration. Because there was "a congressional delegation of administrative authority" with respect to the reimbursement provision at issue here, the concerns addressed in *Adams Fruit Co.* are inapplicable; *Chevron* deference was appropriate. Cf. *Arkansas* v. *Oklahoma*, *supra* (requiring *Chevron* deference to EPA's interpretation of provisions relevant to its issuance of a permit under the Clean Water Act).

b. The other case upon which petitioner relies, *ARAMCO*, 111 S. Ct. at 1227, see Pet. 33-34, is similarly inapposite. Relying on the factors enunciated in *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 140-146 (1976), a pre-*Chevron* decision addressing the level of deference due to Equal Employment Opportunity Commission (EEOC) interpretations, the Court in *ARAMCO* refused to defer to EEOC's interpretation of Title VII. While the continuing vitality of some of *Gilbert*'s rationale is open to question, see 111 S. Ct. at 1236 (Scalia, J., concurring), it is clear that *Gilbert* does not apply here. *Gilbert* held that deference to EEOC interpretations was not always required because Congress had not conferred "upon the EEOC authority to promulgate rules or regulations." *ARAMCO*, 111 S. Ct. at 1235, quoting *Gilbert*, 429 U.S. at 141. Here, in contrast, EPA does have the authority to promulgate rules and regulations. 42 U.S.C. 9615. Hence, its interpretations of

the Act, even if rendered in the course of an adjudication rather than a rulemaking, are entitled to deference. Indeed, in *Arkansas* v. *Oklahoma*, *supra*, this Court recently required *Chevron* deference to an interpretation EPA rendered in a permit adjudication under an analogous regulatory scheme. Accordingly, *Chevron*, not *Gilbert* or *ARAMCO*, controls this case.[10]

3. Petitioner also errs in arguing, Pet. 27-30, that EPA's interpretation of Section 106(b)(2)(A) is not entitled to deference under *Chevron* because it was advanced for litigation purposes. See also Pet. 16, 34, 35. It is true that this Court noted in *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204 (1988), that it has "declined to give deference to an agency's counsel's interpretation of a statute *where the agency itself has articulated no position on the question.*" 488 U.S. at 212 (emphasis added). But the interpretation of Section 106(b)(2)(A) to which the court of appeals deferred here *was* one on which the agency had articulated a position. In fact, it was EPA's interpretation from the start. EPA so construed the statute when acting upon petitions for reimbursement filed by petitioner and entities like it;

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[10] Even if *Gilbert* did govern this case, deference would still be appropriate. Under *Gilbert*, the level of deference depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements." 111 S. Ct. at 1235, quoting *Gilbert*, 429 U.S. at 141. Here, EPA carefully considered the statutory language, canons of statutory construction, and legislative history, concluding that each of them favored prospective application of Section 106(b). See C.A. App. A74-A76. Its reasoning is unquestionably valid; indeed, every federal court that has addressed the issue has reached the same result. And EPA has applied its interpretation consistently. Pet. App. A17.

the interpretation was not an after-the-fact invention of litigation counsel.[11] Indeed, the interpretation now appears in the Code of Federal Regulations, 40 C.F.R. 300.700(e).[12]

4. The balance of petitioner's arguments could have been raised below; but they were not. At most, petitioner alluded to some by claiming that the district court "abdicated its role to EPA, which acted a[s] prosecutor, judge and jury in improperly interpreting this remedial statute in a narrow fashion, so as to unjustifiably deny Wagner Seed's claim for reimbursement of response costs." Wagner C.A. Br. 11. This Court generally does not address issues neither raised nor ruled on below. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984). In any event, the arguments have no merit.

Petitioner claims that the court of appeals' decision implicates separation of powers concerns because "Congress has specifically ordained plenary adjudication by the courts," Pet. 20, and that application of *Chevron* deference in such circumstances "is an unconstitutional abdication of the authority of Article III courts," Pet. 17-18. Petitioner also asserts that *Chevron* deference here violates due process, largely for the same reasons. Pet. 34-36. See also Pet. 17, 19. But this case presents no such concerns. Long before *Chevron*, courts called upon to review an agency's construction of a statute that the agency was charged with administering recognized

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[11] In petitioner's case, the interpretation was spelled out in a June 9, 1988, letter from the Assistant Administrator for Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Washington, D.C. C.A. App. A72.

[12] This interpretation was first noticed as a proposed rule in December 1988. See 53 Fed. Reg. 51,514 (1988).

the appropriateness of judicial deference to the agency's interpretation. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 480 (1921). As explained above, pp. 8-9, *supra*, there is no reason to believe Congress wished courts to refrain from applying that well-established doctrine when construing SARA Section 106; nor is there any suggestion that Congress intended to create a right to deference-free judicial interpretation of statutes administered by EPA. But even if the issue were arguable—and it is not—it would be a question of statutory construction, not one of separation of powers or due process.

Consequently, the separation of powers cases on which petitioner relies are wholly inapposite. In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (see Pet. 17 n.5, 18, 20), this Court held that the Bankruptcy Reform Act of 1978 unconstitutionally conferred Article III judicial power upon judges who did not enjoy the protections afforded Article III judges. Here, the court of appeals merely applied the principles articulated in *Chevron* to a situation involving an ambiguous statute. *Northern Pipeline* does not speak to such a situation. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (see Pet. 17 n.5), this Court considered, in part, whether the powers given to the congressionally appointed Federal Elections Commission in the 1974 Amendments to the Federal Election Campaign Act of 1971 violated Article II, § 2, Cl. 2 of the U.S. Constitution. The only Article III issue was whether there was a case or controversy; this Court held that there was. 424 U.S. at 11-12. And in *Crowell* v. *Benson*, 285 U.S. 22 (1932) (Pet. 21-22), this Court considered "whether the Congress may substitute for constitutional courts, in which the judicial power of the

United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend[s]." 285 U.S. at 56. This case does not involve enforcement of constitutional rights; it involves the agency's interpretation of petitioner's statutory rights with respect to reimbursement.

Nor are petitioner's due process cases relevant. See Pet. 35-36. *North* v. *Russell*, 427 U.S. 328 (1976), found no due process violation where an accused, subject to possible imprisonment, was tried before a nonlawyer police court judge but was permitted a later trial *de novo* available under a State's two-tier court system. 427 U.S. at 329. In *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the Court held that due process was violated where an individual was required to stand trial before the mayor, who was responsible for village finances and whose court provided a substantial portion of village funds through fines, fees and costs. And, in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the Court found that parole revocation, without a hearing, violated due process. None of these cases speaks to the situation in which a court defers to an agency's interpretation of a statute under *Chevron*.[13]

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[13] We also note that the issue involved here is relevant only to a limited and diminishing class of cases—those in which a party received a clean-up order before SARA was enacted in October 1986, more than five years ago, but has not yet completed the clean-up work. While EPA estimates that there are approximately 20 such outstanding orders, few of those will result in applications for reimbursement, as applicants must show that they were not liable for the clean-up under CERCLA's very limited defenses to liability, see p. 4 n.6, *supra*, or that the clean-up actions ordered were arbitrary,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ALBERT M. FERLO, JR.
J. CAROL WILLIAMS
Attorneys

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capricious, or otherwise illegal. 42 U.S.C. 9606(b)(2)(C) and (D).

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